Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 97-2045

In The

Supreme Court of the United States

October Term, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, ET AL.,

Petitioners,

v.

STATE OF ALABAMA AND STATE DEPARTMENT OF REVENUE,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Alabama

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JURISDICTION

As explained in parts I and II of the Argument, this Court lacks jurisdiction over this case both because the Alabama Supreme Court lacked jurisdiction over petitioners' claims against respondents and because the Eleventh Amendment precludes this Court from exercising jurisdiction over the State of Alabama and its Department of Revenue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in relevant part: "[T]he Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Title 28, Section 1257(a) of the United States Code provides in relevant part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . ."

STATEMENT

Petitioners' description of Alabama's corporate franchise tax and their factual account of the proceedings below are unobjectionable, *see* Pet. Br. at 3-17, and we will not unnecessarily lengthen this response by recounting that background. We must reiterate one fact noted by petitioners, however, for its dispositive jurisdictional significance has heretofore been overlooked, not only by petitioners, but by the Alabama Supreme Court and by,

we regret to acknowledge, respondents as well. The only parties opposite petitioners in the Alabama Supreme Court were the State of Alabama and the Alabama Department of Revenue; no state official was a party before the Alabama Supreme Court,[1] as petitioners acknowledge. Pet. Br. at ii. Likewise, under this Court's Rule 12.6, the only respondents before this Court are the State and its Department of Revenue, as petitioners also acknowledge on the face of their filings.

As we demonstrate at length below, this Court lacks jurisdiction over respondents in this case, for two independent reasons. First, it is clear from the plain language of the Alabama Constitution, as well as the Alabama Supreme Court's uniform decisions interpreting it, that the Alabama Supreme Court itself lacked jurisdiction over this case, for the only appellees before it had not waived, and could not waive, their sovereign immunity from suit in any court. Because the Alabama Supreme Court lacked jurisdiction to enter judgment in this case, it follows that this Court likewise lacks jurisdiction to

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[1] Although five of the ten consolidated actions filed by petitioners in the Circuit Court of Montgomery County named the Commissioner of the Alabama Department of Revenue as well as the State and the Department itself, petitioners' notice of appeal to the Alabama Supreme Court designated only the State of Alabama and the Alabama Department of Revenue as appellees. Record 2265. Likewise, the docketing statement signed by petitioners' counsel below designated the "part[ies] appealed against" as the "State of Alabama, State Department of Revenue." Record 2268. Accordingly, the judgment in favor of the Commissioner was not appealed, and the State and the Department of Revenue were the only parties, apart from petitioners, before the Alabama Supreme Court. *See, e.g., Sperau v. Ford Motor Co.*, 674 So. 2d 24, 40 (Ala. 1995) ("[I]t is settled law that a notice of appeal from a judgment in favor of two or more parties must specifically name each party whose judgment the appellant wishes to overturn."), *vacated on other grounds*, 517 U.S. 1217 (1996).

review that judgment. Accordingly, the Court should dismiss the writ of certiorari issued in this case for lack of jurisdiction or as improvidently granted.

Second, quite apart from whether the Alabama Supreme Court had jurisdiction over this case, we respectfully submit that the very letter of the Eleventh Amendment precludes this Court from construing the judicial power of the United States (including this Court's appellate jurisdiction) to extend to any suit (including this suit) commenced and prosecuted against one of the United States (including Alabama), by citizens of another State (including petitioners, all of whom are incorporated in states other than Alabama). The Court's contrary decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), was "patent error," in the recent words of four Justices of the Court, and should be overruled.

With respect to petitioners' claim that the Alabama Supreme Court invoked the doctrine of *res judicata* to bar their Commerce Clause challenge to the Alabama corporate franchise tax, petitioners acknowledge that the Alabama Supreme Court majority's citation to *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990), "can be read to suggest either a ruling on the merits of petitioners' Commerce Clause claims, or a ruling based on *res judicata*, or both." Pet. Br. 17 n.11. We read the majority's reference to the *Reynolds Metals* decision as a ruling on the merits of petitioners' constitutional claims, and so we offer no defense of the decision as a valid application of the doctrine of *res judicata*.

With respect to the merits, the flaw in petitioners' claim lies not in the application to Alabama's corporate franchise tax of this Court's recent negative Commerce Clause cases; the flaw lies rather in the negative Commerce Clause cases themselves. If the Court, contrary to our submission, finds that it has jurisdiction over this case, we respectfully request that it formally reconsider its negative Commerce Clause jurisprudence. We fully

grasp the gravity of this request, and we do not make it lightly. But our arguments are well known to the Court, for the textual, historical, and analytical problems with the negative Commerce Clause have been acknowledged by many Members of the Court, both past and present, and by a wealth of scholarly commentary. The short of our argument is this: under our constitutional scheme of concurrent regulatory power over interstate commerce, Alabama is sovereign over her own corporate franchise taxes – until *Congress* says otherwise. The Commerce Clause says nothing more; the Supremacy Clause requires nothing more, and this Court can demand nothing more.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to consider the merits of this case because respondents are absolutely immune from suit pursuant to Article I, Section 14 of the Alabama Constitution. "Under this provision, the State and its agencies have absolute immunity from suit in *any* court." *Ex parte Franklin County Dep't of Human Resources*, 674 So. 2d 1277, 1279 (Ala. 1996) (emphasis added). Thus, the Alabama Supreme Court lacked jurisdiction over petitioners' claims against respondents – the State and the Department of Revenue. As it is settled that the State's absolute immunity is both jurisdictional and not waivable, "a trial court or an appellate court should, at any stage of the proceedings, dismiss a suit when it becomes convinced that it is a suit against the State and contrary to Sec. 14 of the Constitution." *Aland v. Graham*, 250 So. 2d 677, 678 (Ala. 1971). Because the Alabama Supreme Court clearly lacked jurisdiction over the merits of petitioners' claims against respondents, this Court likewise lacks jurisdiction over this case. Indeed, any opinion rendered by this Court would necessarily be advisory for even if the Court accepted petitioners' claims on the merits and remanded the case to the Supreme Court of Alabama for further proceedings on remedy (as petitioners request, *see* Pet. Br. at 33), the Supreme Court of Alabama could not

provide any relief, as it would be obliged to dismiss for want of jurisdiction.

2. The Eleventh Amendment precludes this Court from exercising jurisdiction over the State of Alabama and the State Department of Revenue, the sole respondents before the Court. In *McKesson Corp.*, 496 U.S. at 31, this Court held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." The Court's decision in *McKesson* is irreconcilable with the plain language of the Eleventh Amendment, which prohibits the exercise of federal "judicial power" over a state in *any* suit commenced by an out-of-state party. Clearly, this Court's review of state court judgments constitutes an exercise of the "judicial power of the United States."

Moreover, the principal authority upon which the Court relied in *McKesson*, Chief Justice Marshall's opinion in *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821), *undermines* rather than supports the Court's holding. Specifically, *Cohens* held that a suit commenced *by* a state is not within the Eleventh Amendment because "[n]othing is demanded from the state. No claim against it is asserted or prosecuted." *Id.* at 410. The Court made clear, however, that a writ of error to the Supreme Court, like a petition for certiorari, would constitute a "suit" under the Eleventh Amendment "when it is to restore the party who obtains it to the possession of anything which is withheld from him. . . . " *Id.* at 409-10. Petitioners' demand here for a refund of taxes paid to the State of Alabama plainly falls squarely within Chief Justice Marshall's understanding of a suit within the meaning of the Eleventh Amendment.

As both the text of the Eleventh Amendment and the Court's decision in *Cohens* foreclose this Court from asserting jurisdiction over a suit commenced against a state, it is hardly surprising that four members of this Court have characterized the reasoning of *McKesson* as "specious." *Seminole Tribe v. Florida*, 517 U.S. 44, 113 n.10

(1996) (Souter, J., dissenting). This Court should close the exception to the Eleventh Amendment carved out by *McKesson* and thereby preserve the "constitutionally mandated balance of power between the States and the Federal Government" that the Eleventh Amendment serves to maintain. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (internal quotations omitted).

3. The text and structure of Article I, as this Court recognized early on, provide ready means for determining when a power granted to Congress may not be exercised concurrently by the states, and there can be no doubt that the states have retained the power to regulate commerce, especially as it is understood today, subject to the Supremacy Clause. The genesis and history of the Court's negative Commerce Clause jurisprudence show that it ultimately rests on the theory that the regulations of commerce set forth in this Court's cases were not ordained by the Constitution itself, but rather were silently "enacted" by Congress. The Court has acknowledged as much in those instances where Congress has overruled or revised specific Commerce Clause decisions of the Court.

The Court's indisputable decisions withdrawing its own regulations of commerce in favor of those enacted by Congress in such cases reveal that the Court's commercial rules are not found in the Constitution (for if they were, Congress could not amend them). Nor may they be considered Acts of Congress, notwithstanding the Court's suggestion that "the inaction of congress was in itself the equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the states," *In re Rahrer*, 140 U.S. 545, 562 (1891), because the Constitution's "finely wrought" procedures of Article I, Section 7 have not been observed. *INS v. Chadha*, 462 U.S. 919, 951 (1983). If the commercial regulations set forth in the Court's cases cannot be found in either the Constitution or the laws enacted by Congress, this Court lacks the power to prescribe them. Just as "[t]here is no provision

in the Constitution that authorizes the President to enact, to amend, or to repeal statutes," *City of New York v. Clinton*, 118 S. Ct. 2091, 2103 (1998), the Framers did not grant such authority to the Judiciary.

The doctrine of *stare decisis* does not counsel against restoring the structure established by the Framers. First and foremost, the negative Commerce Clause doctrine, we respectfully submit, represents " 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make [the Court] hesitate to correct.' " *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79, 80 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). Moreover, a decision announcing that the Court will no longer invalidate state laws that do not conflict with Acts of Congress would have, at most, a minimal impact upon settled expectations.

ARGUMENT

I. BECAUSE THE ALABAMA SUPREME COURT LACKED JURISDICTION OVER PETITIONERS' CLAIMS AGAINST RESPONDENTS, THIS COURT LACKS JURISDICTION AS WELL.

1. Section 14 of Article I of the Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law." The Alabama Supreme Court has consistently held that "[u]nder this provision, the State and its agencies have absolute immunity from suit in *any* court." *Ex parte Franklin*, 674 So. 2d at 1279 (emphasis added).[2] It likewise has long been

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[2] *See also, e.g., Alabama State Docks v. Saxon*, 631 So. 2d 943, 946 (Ala. 1994) ("This Court has recognized the almost invincible wall of the state's immunity, as established by the people through their Constitution.") (citations and internal

settled that this immunity is jurisdictional. "We have held that the circuit court is without jurisdiction to entertain a suit against the State because of Sec. 14 of the Constitution." *Aland*, 250 So. 2d at 678 (citation omitted). And the Alabama Supreme Court "will take notice of the question of jurisdiction at any time or even *ex mero motu*." *Id.* Nor can the state's immunity be waived. "It is familiar law in this state that § 14 'wholly withdraws from the Legislature, or any other state authority, the power to give consent to a suit against the state.' . . . Therefore, it is clear that neither the legislature nor [a state agency] had the power to waive, either expressly or impliedly, the state's immunity under § 14." *Alabama State Docks v. Saxon*, 631 So. 2d 943, 946 (Ala. 1994) (citations omitted); *see also Williams v. Hank's Ambulance Serv.*, 699 So. 2d 1230, 1232 (Ala. 1997); *Gunter v. Beasley*, 414 So. 2d 41, 48 (Ala. 1982).

This Court too has recognized the inability of the state or any of its officers to waive the sweeping immunity that the Alabama Constitution accords to the State and its agencies. Indeed, in *Alabama v. Pugh*, 438 U.S. 781, 782 (1978), the Court held that the Eleventh Amendment required that the State and the Department of Corrections be dismissed from a federal court suit, noting that "it appears that no consent [to suit] could be given under Art. I, § 14 of the Alabama Constitution." *See also Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 194 (1964) (noting "state cases holding that neither the legislature nor a state officer has the power to waive the State's immunity").

In sum, "a trial court or an appellate court should, at any stage of the proceedings, dismiss a suit when it

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quotations omitted); *Mitchell v. Davis*, 598 So. 2d 801, 806 (Ala. 1992); *Unzicker v. State*, 346 So. 2d 931, 933 (Ala. 1977) ("To the extent that the State of Alabama is impleaded as a defendant in this action, the action is prohibited by the Constitution.").

becomes convinced that it is a suit against the State and contrary to Sec. 14 of the Constitution." *Aland*, 250 So. 2d at 678. As demonstrated previously (*supra*, at 1-2), the State of Alabama and its Department of Revenue were the only appellees before the Alabama Supreme Court and are, therefore, the only respondents in this Court. Thus, the Alabama Supreme Court lacked jurisdiction to hear petitioners' claims against respondents,[3] and it necessarily follows that this Court lacks jurisdiction as well.

2. If an inferior court whose judgment is under review lacked jurisdiction to decide the substantive legal issue in dispute, the reviewing court necessarily also lacks appellate jurisdiction to decide the cause. Just last Term, this Court reiterated:

> [E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining this suit.

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[3] The trial court *did* have jurisdiction over petitioners' claims against the Commissioner of the Department of Revenue under the well-established exception to Article I, Section 14, similar to this Court's *Ex parte Young*, 209 U.S. 23 (1908), exception to Eleventh Amendment immunity, for actions brought against state officers. *E.g.*, *Williams*, 699 So. 2d at 1232 (describing state officer exceptions). However, as noted previously, petitioners did not appeal the trial court's judgment in favor of the Commissioner to the Alabama Supreme Court.

Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1013 (1998) (citations and internal quotations omitted); *see, e.g., Jackson v. Ashton*, 8 Pet. (33 U.S.) 148, 148 (1834) (Marshall, C.J.) ("[I]t is the opinion of this court, that the said circuit court could not entertain jurisdiction of this cause, and that, consequently, this court has not jurisdiction in this cause, but for the purpose of reversing the decree of the said circuit court, entertaining said jurisdiction.").[4]

The same rule regarding jurisdiction over the merits of a dispute obtains in cases coming to this Court from state courts. *See, e.g., Palmer v. Ohio*, 248 U.S. 32, 33-34 (1918) (dismissing for want of jurisdiction where state court lacked jurisdiction by virtue of State's sovereign immunity); *Callan v. Bransford*, 139 U.S. 197, 198 (1891) (where state court of appeals dismissed for lack of "jurisdiction under the constitution of the state . . . we are of the opinion that the writs of error to that court must be dismissed"); *Smith v. Adsit*, 16 Wall. (83 U.S.) 185, 189-90 (1872); *Semple v. Hagar*, 4 Wall. (71 U.S.) 431, 434-35 (1866); *Beers v. Arkansas*, 20 How. (61 U.S.) 527, 530 (1857) ("writ of error must . . . be dismissed, for want of jurisdiction in this court" where state court lacked jurisdiction by virtue of state's sovereign immunity); *President & Dirs. of Bank of Washington v. Arkansas*, 20 How. (61 U.S.) 530, 532 (1857) (same).[5]

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[4] Of course, in cases coming from state supreme courts, this Court lacks the power to review and correct jurisdictional determinations actually made in the court below. Had the jurisdictional defect in this case been raised and passed upon by the Alabama Supreme Court, its determination would have been binding.

[5] The Court's decision in *General Oil Co. v. Crain*, 208 U.S. 211, 226-27 (1908), (assuming that it was not overruled in *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949); *see Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2057 n.14 (1997) (Souter, J., dissenting)), has no application here. That case held as a matter of federal due process that a state may not confer

The requirement that an appellate court must satisfy itself that the lower courts' jurisdiction has been established " 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " *Steel Co.*, 118 S. Ct. at 1012 (citations omitted). This Court aptly described the essence of jurisdiction 160 years ago:

> Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extra-judicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction. . . .

Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657, 718 (1838).

If the court below lacked jurisdiction, its action was thus "extra-judicial"; it acted "without the authority of law, to render a judgment or decree upon the rights of the

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immunity on both the State and its officers because plaintiffs would thereby be deprived of any state forum to redress federal constitutional claims. As Justice Souter has pointed out, Alabama (like the other 49 states) provides a state official exception similar to this Court's *Ex parte Young* doctrine to the State's sovereign immunity. *Coeur d'Alene*, 117 S. Ct. at 2057 n.15 (Souter, J., dissenting) (citing *Aland*, 250 So. 2d at 679). Indeed, Alabama goes further than *Ex parte Young* in that it permits suits against state officials seeking an order requiring "the ministerial act of refunding tax money. . . . " *Williams*, 699 So. 2d at 1237. Thus, petitioners in this case had available to them a state forum with authority to provide both prospective and retrospective relief had they prevailed on their claims against the Commissioner of Revenue. As noted above, petitioners did not appeal the judgment entered by the trial court in favor of the Commissioner.

litigant parties." In that event, there is no legal "judgment," *see* 28 U.S.C. § 1257(a), to be reviewed by this Court in the exercise of its "appellate Jurisdiction" because such a judgment has always been understood to be void. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 n.10 (1982) ("It is axiomatic that a judgment must be supported by a proper showing of jurisdiction over the subject matter and over the relevant parties. One State's refusal to enforce a judgment rendered in another State when the judgment is void for lack of jurisdiction merely gives to that judgment the same 'credit, validity, and effect' that it would receive in a court of the rendering State.").

3. That respondents failed to bring this jurisdictional defect to the attention of the Alabama Supreme Court cannot provide this Court with jurisdiction it otherwise lacks.[6] " 'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' " *Steel Co.*, 118 S. Ct. at 1012 (citations omitted). Thus, federal courts, including this Court, must "presume that

[6] We regretfully acknowledge that respondents, in addition to failing to present the issue below, failed to note the jurisdictional defect in their Brief in Opposition to the Petition for Certiorari, notwithstanding the requirements of this Court's Rule 15.2. Still, the issue cannot be avoided, as it is jurisdictional. *See Adams v. Robertson*, 117 S. Ct. 1028, 1032 n.5 (1997) ("Respondents' obligation to object under Rule 15.2 was not diminished by the fact that their objection may have been based on this Court's jurisdiction, *see supra*, at 1031, and thus nonwaivable.").

[they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations and internal quotations omitted).

Indeed, any opinion rendered by this Court would necessarily be advisory, for even if the Court accepted petitioners' claims on the merits and remanded to the Supreme Court of Alabama for further proceedings on remedy (as petitioners request, *see* Pet. Br. at 33), the Supreme Court of Alabama could not provide any relief as it would be obliged to dismiss for want of jurisdiction. *See, e.g., Aland*, 250 So. 2d at 678 ("[A] trial court or an appellate court should, at *any stage of the proceedings*, dismiss a suit when it becomes convinced that it is a suit against the State and contrary to Sec. 14 of the Constitution.") (emphasis added). This Court has recognized this reality in the analogous context of its independent and adequate state grounds jurisprudence:

> "[O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)); *see also California v. Freeman*, 488 U.S. 1311, 1314 (1989) (O'Connor, J., Circuit Justice) ("Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory grounds.").[7]

[7] It is for this reason that the "plain statement" presumption of *Michigan v. Long*, 463 U.S. 1032 (1983), has no

In sum, the Alabama Constitution and the Alabama Supreme Court's consistent decisions interpreting it leave no room for doubt that the Alabama Supreme Court lacked jurisdiction over respondents. It follows that this Court likewise lacks jurisdiction to consider the merits of petitioners' claims. We therefore submit that the Court may properly dismiss the writ of certiorari for want of jurisdiction, *see, e.g., Webb v. Webb*, 451 U.S. 493, 501-02 (1981); *see also* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE 142 (7th ed. 1993) (citing cases), notwithstanding its traditional reluctance to resolve issues of state law. Alternatively, the Court may simply wish to dismiss the writ as improvidently granted to avoid adjudicating a question of state law.[8]

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application here. Presuming state court jurisdiction under this rule would be no different than exercising the "hypothetical jurisdiction" condemned last Term in *Steel Co.* It likewise would "produce nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion. . . . " 118 S. Ct. at 1016. Because the issue was never presented to the Alabama Supreme Court, it had no opportunity to issue a "plain statement" grounding its disposition in its lack of jurisdiction over respondents. As explained in the text, there can be no question that the Alabama Supreme Court must dismiss this case for lack of jurisdiction at the first opportunity on remand, thereby rendering advisory any opinion of this Court on the merits.

[8] Alternatively, if the Court has any question concerning the application of Article I, Section 14 in this case, and wishes to inquire further into the matter rather than dismissing the writ as improvidently granted, the Court could remand the case to the Supreme Court of Alabama to address this jurisdictional issue in the first instance.

II. THE ELEVENTH AMENDMENT PRECLUDES THIS COURT FROM EXERCISING JURISDICTION OVER THE STATE OF ALABAMA AND THE ALABAMA DEPARTMENT OF REVENUE.

Quite apart from the question whether the Alabama Supreme Court had jurisdiction to enter the judgment under review, we submit that the Eleventh Amendment precludes the exercise of this Court's appellate jurisdiction over this case. Although this issue was not raised in respondents' opposition to the petition for writ of certiorari, Alabama has not waived its Eleventh Amendment rights. It is well-established that a state's waiver of its Eleventh Amendment rights must be "unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (citing *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Accordingly, this Court has repeatedly held that a State that fails to raise a claim of Eleventh Amendment immunity in either federal district court or in a federal court of appeals has not waived its Eleventh Amendment rights.[9]

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[9] *See, e.g., Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945) ("The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."); *Pugh*, 438 U.S. at 783 n.1 (" 'The Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court. . . . ' ") (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)). *Cf. Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982) (although state had failed to raise Eleventh Amendment in district court pleadings, state agency was not precluded "from raising its Eleventh Amendment claim on remand" from this Court). Moreover, this Court has held "that no consent could be given under Art. I, § 14, of the Alabama Constitution, which provides that 'the State of Alabama shall *never* be made a defendant in *any* court of law or equity.' " *Pugh*, 438 U.S. at 782 (emphasis added). Likewise, the Alabama Supreme Court has

The Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This Court, recognizing that behind the words of the Eleventh Amendment is "the postulate that States of the Union . . . shall be immune from suits, without their consent," has never been willing to "assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States." *Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-23 (1934)). Thus, this Court has interpreted the Eleventh Amendment to immunize a non-consenting state against suits brought by its own citizens and by foreign nations. *See Hans v. Louisiana*, 134 U.S. 1 (1890) (state immune from suit by its own citizen); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (state immune from suit by foreign nation).

This case, however, falls squarely within the very letter of the Eleventh Amendment. The term "any suit" certainly embraces this suit; this suit is against Alabama, which is certainly "one of the United States"; the suit was commenced and prosecuted by petitioners, all of whom are certainly "citizens of another State";[10] and the

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squarely held that this constitutional provision precludes the State from waiving its sovereign immunity under any circumstances. *See, e.g., Williams*, 699 So. 2d at 1232 (" '[N]either the State nor any individual can consent to a suit against the State.' ") (quoting *Gunter*, 414 So. 2d at 48 (internal citations omitted)).

[10] Each of the petitioners is a corporation incorporated under the laws of states other than Alabama. *See* Pet. Br. at 2. This Court long ago decided that a corporation is a "citizen," as that term applies under the Constitution, of the State that

"Judicial power of the United States" certainly includes the appellate judicial power of this Court. Therefore, if this Court construes its appellate judicial power to extend to this suit, it will be doing precisely – *precisely* – that which the Eleventh Amendment unequivocally forbids.

Despite the clarity of the amendment's language, this Court in *McKesson v. Division of Alcoholic Beverages*, 496 U.S. at 31, held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." More recently, four Members of the Court, noting that "the Amendment's unconditional language ('shall not be construed') makes no distinction between trial and appellate jurisdiction," dismissed as "specious" the *McKesson* Court's reasoning that "an appeal is not a 'suit' for purposes of the Amendment." *Seminole Tribe*, 517 U.S. at 113 & n.10 (Souter, J., dissenting). As these Justices noted, "[w]hether or not an appeal is a 'suit' in its own right, it is certainly a means by which an appellate court exercises jurisdiction over a 'suit' that began in the courts below." *Id.* at 113 n.10.

An examination of *McKesson* reveals that this criticism is well-taken.[11] According to the *McKesson* Court,

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created it. *See Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 248 (1905) ("It has long been settled that a corporation will be treated . . . as a citizen of the state under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States, to controversies between citizens of different states.") (citations omitted). The Eleventh Amendment has since then barred suits by foreign corporations, as citizens of other states, against a defendant state. *E.g., Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Lankford v. Platte Iron Works Co.*, 235 U.S. 461 (1915) (dismissing suit by plaintiff, "a Maine corporation and a citizen of that state," against Oklahoma State Banking Board).

[11] Several commentators have noted the conflict between this Court's exercise of appellate jurisdiction over states named as defendants in state court actions and the Court's long-

the wellspring of its decision was Chief Justice Marshall's opinion in *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821). *Cohens*, however, actually undermines rather than supports the decision in *McKesson*.

In that case, the State of Virginia commenced a suit against two Virginia residents who had allegedly violated that state's anti-gambling law by selling lottery tickets. The state courts rejected the individuals' defense that federal law specifically permitted their activity. The defendants subsequently filed a writ of error in the United States Supreme Court seeking review of the federal question they had raised.[12] In considering whether the Eleventh Amendment prevented this Court from exercising appellate jurisdiction over the State of Virginia, Chief Justice Marshall stated that the Amendment "was intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union." 6 Wheat. (19 U.S.) at 407.

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standing conclusion that the Eleventh Amendment bars federal question cases. *See, e.g.*, Vicki Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 11-12.

[12] Chief Justice Marshall initially considered whether the Supreme Court had jurisdiction over the case under Article III "as the constitution originally stood" prior to ratification of the Eleventh Amendment. 6 Wheat. (19 U.S.) at 405. The Court concluded that it was "authorized to decide all cases of every description, arising under the constitution or laws of the United States." *Id.* at 382. The Court explained that "[f]rom this general grant of jurisdiction, no exception is made of those cases in which a State may be a party" and thus the Court had jurisdiction "whoever may be the parties" to a case arising under the Constitution. *Id.* at 382-83. Chief Justice Marshall then turned his attention to an analysis of the effect of the Eleventh Amendment on the Court's jurisdiction under Article III.

Having identified the core purpose of the amendment, the Court considered the question whether a writ of error constituted a "suit" within the meaning of the Eleventh Amendment. The term "suit," according to Chief Justice Marshall, means "the prosecution, or pursuit, of some claim, demand, or request." *Id.* at 407. And, "[t]o commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand." *Id.* at 408. It followed, therefore, that "a suit commenced by an individual against a state" is, simply, "process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court." *Id.*

Applying these principles to the case before it, the Court in *Cohens* concluded that

> this suit is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defence against a claim made by a State.

Id. at 409. Chief Justice Marshall elaborated further:

> Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. *Nothing is demanded from the State. No claim against it of any description is*

> *asserted or prosecuted. The party is not to be restored to the possession of any thing. . . .*

Id. at 410 (emphasis added).

The *Cohens* case, therefore, stands for the simple and seemingly obvious proposition that a suit commenced by a state against an individual is not a suit commenced by an individual against a state, and the former does not somehow become the latter if the individual defendant seeks review in this Court of a constitutional defense.[13]

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[13] It is noteworthy that Chief Justice Marshall's conclusion – that the Eleventh Amendment bars the exercise of federal judicial power, including this Court's appellate power, over a suit commenced by an individual against a state, but not over a suit commenced by a state against an individual – is entirely in keeping with Marshall's earlier view, expressed in the Virginia ratifying convention, that the Diversity Clause of Article III would itself have precisely the same effect. At the convention, somewhat in tension with the analysis of Article III in *Cohens*, *see supra* at 18 n.12, Marshall had denied that out-of-state citizens could bring suits in federal court against the states, contending that the intent of the Diversity Clause was, rather, "to enable States to recover claims of individuals residing in other States." 3 J. Elliot, DEBATES ON THE FEDERAL CONSTITUTION 555 (2d ed. 1836) (John Marshall, Virginia Convention). With respect to the complaint that such a construction would render the Diversity Clause a one-way-street, Marshall noted that the states' sovereign immunity made it unavoidable:

> It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account?

Id. Thus, Marshall apparently believed that the Eleventh Amendment simply restored to the states the sovereign immunity from federal suits that they enjoyed before the Court's decision in *Chisolm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793), which held that the Diversity Clause grants federal jurisdiction over a suit brought against a state by a non-citizen.

Not only was the suit brought by Virginia in *Cohens* plainly outside the language of the Eleventh Amendment, it was equally plainly outside the purpose of the amendment. A state needs no sovereign immunity when it *commences* a lawsuit, for "[n]othing is demanded from the State." *Id.*

By the same token, a suit, like the instant suit, commenced by non-citizen plaintiffs against a state is plainly within the language and purpose of the Eleventh Amendment, and such a suit is not somehow transformed into something else when the plaintiffs seek review of the case in this Court. To paraphrase *Cohens*, something *is* demanded of the state; a claim *is* asserted against it, and the plaintiff *does* seek to be restored to the possession of some thing, in this Court no less than in the state courts. Indeed, Chief Justice Marshall said as much: "A writ of error . . . is in the nature of a suit or action when it is to restore the party who obtains it to the possession of something which is withheld from him. . . . " *Id.* at 409-10. Thus, for the very reasons that the suit before the Court in *Cohens* was not barred by the Eleventh Amendment, the petitioners' suit here plainly is.[14]

The *McKesson* Court also relied on Justice Harlan's statement that "a writ of error to review the final judgment of a state court, even when a state is a formal party and is successful in the inferior court, is not a suit within the meaning of the [Eleventh] Amendment." *General Oil Co. v. Crain*, 209 U.S. 211, 233 (1908) (Harlan, J.,

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[14] In *Hans v. Louisiana*, this Court continued to adhere to Chief Justice Marshall's understanding that the Eleventh Amendment is not implicated where " 'nothing is demanded from the state.' " 134 U.S. at 19 (quoting *Cohens*, 6 Wheat. (19 U.S.) at 410). The Court noted that "writs of error to judgments in favor of the crown, or of the state, had been known to the law from time immemorial, and had never been considered as exceptions to the rule that an action does not lie against the sovereign." *Id.* at 20.

concurring). Justice Harlan's *dictum*[15] relied exclusively on *Cohens*, which undermines rather than supports the proposition.[16]

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[15] Justice Harlan's comments in his concurrence in *General Oil Co. v. Crain*, 209 U.S. 211 (1908), are plainly *dicta*. As Justice Harlan believed that the case had been decided below on an independent state law ground, he concluded that "what is said in the opinion of the court about the Eleventh Amendment is, I submit, entirely irrelevant to any decision of the present case by this court." *Id.* at 233 (Harlan, J., concurring). Nevertheless, he went on to add the statement quoted in the text. The Court's similar statements in *Chandler v. Dix*, 194 U.S. 590, 592 (1904), are likewise *dicta*. In that case, the Court considered whether suit could be filed in federal district court against a state to have a state tax declared unconstitutional. The Court held that "as this suit cannot be maintained against a state, the bill, so far as it seeks to have tax sales declared void, must be dismissed. . . . " 194 U.S. at 591. Thus, the issue of whether the Eleventh Amendment applied to the review of a state court judgment was not before the Court in *Dix*.

[16] Similarly, Justice Story relied exclusively on *Cohens* for his statement in his dissenting opinion in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. (36 U.S.) 420, 585 (1837), that the Supreme Court may review any state court decision rejecting a constitutional claim "whoever may be the parties to the original suit, whether private persons, or the state itself." Justice Story's sweeping statement was *dicta*, for in the very next sentence he stated that the Eleventh Amendment was not applicable because "the state of Massachusetts is not a party on the record in this suit, and therefore, the constitutional prohibition of commencing any suit against the state, does not apply. . . . " It is noteworthy that Justice Story's A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES reflects that he well understood the distinction drawn by Chief Justice Marshall in *Cohens* between a suit commenced *by* the state and one commenced *against* the state. Specifically, Justice Story stated that the Eleventh Amendment "was designed to prevent any suit being originally commenced *by* any private person *against* a State," while at the same time he recognized that a suit

Aside from the inapt invocation of *Cohens* and the *dicta* in Justice Harlan's concurring statement in *Crain*, the sole rationale advanced by the *McKesson* Court in support of its exercise of appellate jurisdiction over a suit brought against a state was the need for "national uniformity of federal law" that arises under the Supremacy Clause. 496 U.S. at 29.[17] The Court relied upon *Smith v. Reeves*, 178 U.S. 436 (1900), which in *dicta* stated that a state may

> consent to be sued in its own courts . . . and at the same time exclude the jurisdiction of the Federal courts – subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the state in any action brought against it with its consent may be reviewed or

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"originally commenced *by* a State *against* a private person in any other Court, which involved any [federal] question . . . might still be revised by the Supreme Court. . . . " Joseph Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 363, at 217 (The Legal Classics Library special ed., 1992) (emphasis in original).

[17] The Court referred to its "time-honored practice," 496 U.S. at 428, of asserting jurisdiction over states, but none of the cases cited in support of this practice even addressed the Eleventh Amendment. *See McKesson*, 496 U.S. at 27 n.8 (collecting cases). Accordingly, they have no bearing on the Eleventh Amendment issue raised here. Likewise, an Eleventh Amendment defense was not raised by the Director of State Police in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). *See also Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) (Eleventh Amendment not raised as jurisdictional defense in suit against state officer for injunctive (and monetary) relief). As the Court noted last Term, such "drive-by jurisdictional rulings . . . have no precedential effect," *Steel Co.*, 118 S. Ct. at 1011 (citations omitted), particularly in view of the fact that states may waive Eleventh Amendment immunity.

> re-examined [by the Supreme Court], *as prescribed by the act of Congress*, if it denies to the plaintiff any [federal] right. . . .

178 U.S. at 445 (emphasis added).[18]

Thus, an "act of Congress," presumably Section 25 of the Judiciary Act of 1789, was cited by the *Smith* Court as abrogating the states' sovereign immunity in such instances. This theory of abrogation, however, cannot survive the central holding of *Seminole Tribe* that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 517 U.S. at 73. Just as Congress lacks authority under the Commerce Clauses to abrogate the states' sovereign immunity under the Eleventh Amendment, so too Congress lacks such authority under Article III. As the Court in *Seminole Tribe* explained, the scope of the Eleventh Amendment cannot be limited " 'through appeal to antecedent provisions of the Constitution.' " 116 S. Ct. at 1128 (quoting *Pennsylvania v. Union Gas*, 491 U.S. 1, 42 (1989) (Scalia, J., dissenting)).[19]

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[18] This statement, too, was *dicta*; the Court held that the Eleventh Amendment precluded it from exercising jurisdiction over the case because the suit "though in form against an officer of the state" was in reality "against the state itself." 178 U.S. at 440.

[19] The Court's decision in *Smith* does not, contrary to the suggestion in *McKesson*, 496 U.S. at 30-31, stand for the proposition that states impliedly "assent" to the exercise of this Court's appellate "Judicial power" when they permit themselves to be sued in their own courts. Were this theory correct, then states would presumably be deemed to waive their sovereign immunity with respect to the exercise of federal judicial authority in all federal courts, "for the Amendment's unconditional language . . . makes no distinction between trial and appellate jurisdiction." *Seminole Tribe*, 517 U.S. at 113 (Souter, J., dissenting). Such a result is inconsistent with this Court's repeated insistence that any waiver of sovereign immunity be "unequivocally expressed," which serves the important purpose of foreclosing such a circumvention of the Eleventh Amendment. *Pennhurst State School*, 465 U.S. at 99. Finally, even if there were merit in this implied consent theory, Article I, Section 14 of the Alabama State Constitution makes clear that no consent, implied or otherwise, has been given by the State to the exercise of jurisdiction by this Court or any other court.

Even on its own terms, the "national uniformity" rationale is wholly inapplicable to this case, for it is premised on the assumption that the State has consented to be sued in its own courts. As demonstrated at length in our initial argument, however, the State of Alabama has unequivocally provided that it "shall never be made a defendant in any court of law." Ala. Const. art. I, § 14. Thus, suits complaining of unconstitutional state action, whether brought in federal court or Alabama's own courts, are confined to actions against state officers.

This fact raises a larger point. Nothing in the constitutional plan, including its requirement of federal supremacy, mandates the exercise of judicial power, whether state or federal, directly over a state:

> Undoubtedly the Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws. But since the Constitution does not deem this to require that private individuals be able to bring claims against the *Federal Government* for violation of the Constitution or laws, it is difficult to see why it must be interpreted to require that private individuals be able to bring such claims against the *States*. If private initiation of suit against the offending sovereign as such is essential to preservation of the structure, it is difficult to see why it would not be essential at both levels. Indeed, if anything it would seem more important at the

> federal level, since suits against the States for violation of the Constitution or laws can at least be brought by the Federal Government itself. In providing federal immunity from private suits, therefore, the Constitution strongly suggests that state immunity exists as well. . . . I think it impossible to find in the scheme of the Constitution a necessity that private remedies be expanded beyond this, to include a remedy not available, for a similar infraction, against the United States itself.

Pennsylvania v. Union Gas, 491 U.S. 33-34 (1989) (Scalia, J., dissenting) (emphasis in original).

Faithful adherence to the principle of sovereign immunity embodied in the Eleventh Amendment will not undermine the federal courts' ability to prevent ongoing constitutional violations. As the Court in *Seminole Tribe* noted, there are several established means of vindicating constitutional rights in federal court. First, the United States may bring suit in federal court against a state. *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *United States v. Texas*, 143 U.S. 621, 644-45 (1892)). Second, an aggrieved party may obtain prospective injunctive relief against a state officer in federal court. *Id.* (citing *Ex parte Young*, 209 U.S. 123 (1908)). Third, a state may consent to federal court jurisdiction either by commencing a suit itself, as in *Cohens*, or by "unequivocally" waiving its sovereign immunity. *Pennhurst State School*, 465 U.S. at 99. As noted, here such consent has not been and could not under state law be given by the State of Alabama. *See Pugh*, 438 U.S. at 782 ("the State of Alabama shall *never* be made a defendant in *any* court of law or equity") (quoting Article I, Section 14 of the Alabama Constitution) (emphasis added). Quite apart from these avenues of relief, Congress is free to abrogate the states' Eleventh Amendment

rights when legislating pursuant to Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

The history of the Eleventh Amendments' proposal and ratification brings the error of *McKesson* into sharp focus. The specific purpose of the Eleventh Amendment was to overrule *Chisholm v. Georgia*, which held that this Court had jurisdiction under Article III over an original action brought against Georgia by a citizen of another state. The states' objection to *Chisholm* was not that this Court had exercised its *original* jurisdiction over the suit, but that the Court had exercised jurisdiction at all. Had the Eleventh Amendment, when proposed to the states, contained an exception for the Supreme Court's appellate jurisdiction over suits brought against states in state courts, "[t]he supposition that it would [have been adopted] is almost an absurdity on its face." *Hans v. Louisiana*, 134 U.S. at 15.[20] This Court's decision in *McKesson* effectively reduces the Eleventh Amendment to little more than a requirement that litigants against the states exhaust their state court remedies.

Accordingly, in conformity with the text and history of the Eleventh Amendment, this Court should overrule *McKesson* and dismiss this case for want of jurisdiction.[21]

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[20] Indeed, some scholars have pointed to the Court's decision in *McKesson* as an across the board distinction between the two. *See, e.g.*, James Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. Rev. 161 (1998). If this understanding, which is concededly irreconcilable with the text of the Amendment, were correct, then there would be no obstacle to implementing the suggestion advanced by these scholars that Congress vest the federal courts of appeal with jurisdiction over unconsenting states. *Id.* at 197.

[21] As a technical matter, it may not be necessary to overrule *McKesson*, for that case did not fall within the plain

III. THIS COURT'S NEGATIVE COMMERCE CLAUSE JURISPRUDENCE SHOULD BE ABANDONED.

With James Madison, this Court has always recognized the two signal achievements of the system designed by the Framers of our Constitution:

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)). This Court's negative Commerce Clause jurisprudence pierces both of these shields, the separation of powers and federalism, for its effect has been to grant the federal judiciary the legislative power, rightfully belonging to the state legislatures, to regulate commerce where Congress has not acted. As we shall demonstrate, it is an accepted feature of this jurisprudence that the rules promulgated by this Court are *not* divined from the Commerce Clause itself (for if they were, Congress would lack the power to amend them) but rather from the silence of Congress.[22] The theoretical

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language of the Eleventh Amendment; two of the petitioners in that case, Florida Beverage Corporation and Tampa Crown Distributors, Inc., were incorporated in the State of Florida and thus were not "Citizens of another State."

[22] Thus, it is important to recognize that the suggestion the Court is legislating in this field is very different from the (often unfair) criticism leveled against the Court's constitutional

justification for the Court's regulations – that by failing to act Congress expresses its will that certain state laws be preempted – cannot be squared with Article I, Section 7. And the reality of the Court's practice – that the Court is itself exercising the power to regulate commerce whenever Congress chooses not to act – is inconsistent both with the separation of powers (in that the Court is legislating) and with federalism (in that the Court is invalidating state laws that are contrary to neither the Constitution itself nor any law of the United States).

We respectfully submit that the Constitution's grant to Congress of the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, has no application where Congress has not exercised this power, and this Court should acknowledge that its decisions discerning substantive commercial regulations from the silence of Congress have been in error.

A. The Text and Structure of Article I Demonstrate that Congress' Power to Regulate Commerce Does Not Itself Operate as a Limitation Upon the States.

1. It has been settled at least since Chief Justice Marshall's unanimous opinion for the Court in *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122, 193 (1819), that "the mere grant of a power to congress, did not imply a prohibition on the states to exercise the same power."

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rulings in other areas. Whatever one thinks of the Court's interpretation of "due process," or "equal protection," in those areas the Court is attempting to ascertain the meaning of undeniably open-ended constitutional text. Here, it is a central feature of the Court's jurisprudence that the rules it promulgates are *not* required by the Court's interpretation of the text of the Constitution, and thus may be amended by Congress.

As this Court has long recognized, the three part textual analysis, later adopted in *Sturges*, for determining whether a particular power granted to Congress may be exercised by the states, originated with Alexander Hamilton:

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (*quoted in Goldstein v. California*, 412 U.S. 546, 552-53 (1973) (applying test to determine whether states may exercise copyright power)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (observing that *Sturges* "endorsed Hamilton's reasoning in THE FEDERALIST NO. 32").

2. The application of this textual analysis to the power to regulate interstate commerce unquestionably leads to the conclusion that the power is not exclusively granted to Congress, but rather may be exercised concurrently by the states. *First*, the grant of power to regulate

commerce among the several states is not expressly made exclusive. *Second*, there is no express prohibition against its exercise by the states – except insofar as the Import-Export Clause or the Duty of Tonnage Clause apply. U.S. Const. art. I, cls. 2, 3. Indeed, the fact that the Framers believed it necessary to prohibit the states, "without the Consent of Congress, [from] lay[ing] any Imposts or Duties on Imports or Exports," and from "lay[ing] any Duty of Tonnage," strongly indicates that they did not believe the grant to Congress of the power to regulate commerce operated, in and of itself, as a limitation on the states. U.S. Const. art. I, § 10, cls. 2, 3. *See* THE FEDERALIST No. 32, at 199-200 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (prohibition against laying of import and export duties by the states leads to the conclusion that "the States, in all cases to which the restriction did not apply, would have the concurrent power of taxation with the Union"); *id.* at 201 ("We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States to insert negative clauses prohibiting the exercise of them by the States. . . . This circumstance is a clear indication of the sense of the convention. . . .).[23]

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[23] This is so regardless of whether one accepts the holding of *Woodruff v. Parham*, 8 Wall. (75 U.S.) 123 (1869), limiting the application of the Import-Export Clause to trade with foreign nations. *But see Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1620-28 (Thomas, J., dissenting) (arguing that the Import-Export Clause extends to trade among the States as well). The implication against exclusive federal power arising from the Import-Export Clause necessarily extends to both the power to regulate foreign commerce and the power to regulate interstate commerce because it is not plausible to ascribe to the Framers the notion that the power to regulate foreign commerce is by nature susceptible to concurrent exercise by the States while regulation of interstate commerce requires the uniformity borne of exclusivity.

Third, the nature of the power admits of concurrent exercise because "a similar authority in the States would [not] be absolutely and totally *contradictory* and *repugnant*." *Id.* at 198. Moreover, the line between interstate commerce (particularly in light of the virtually unlimited scope accorded to this field by the Court's modern Commerce Clause cases) and almost every area of legitimate state regulation (*e.g.*, regulation of intrastate commerce, taxation, health and safety regulations) plainly is not susceptible to clear demarcation. *See Sturges*, 4 Wheat. (17 U.S.) at 195-96. Accordingly, the power granted to Congress to regulate interstate commerce is not by nature exclusive, and the states should be permitted to exercise power over such cases within the "subject" (here, "commerce") "as the laws of the Union may not reach." *Id.* at 195.

This Court has always accepted the first part of this conclusion.

> Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (27 U.S.) 245 (1829), and *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 299 (1852), it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.

Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 766-67 (1945).[24] Under the textual analysis embraced by

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[24] Prior to *Willson*, Justice Johnson had asserted that "[t]he power of a sovereign state over commerce . . . must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon." *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 227 (1824) (Johnson, J., concurring). Justice Johnson acknowledged that his "views of the subject [were] materially different from

Hamilton and adopted by the Court in *Sturges*, that should have been the end of the matter: where the power was not exclusively granted to Congress (whether by the terms of the grant, by separate prohibition against state exercise elsewhere, or by the nature of the power), "[i]t is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." *Sturges*, 4 Wheat. (17 U.S.) at 196; *see also Thornton*, 514 U.S. at 801 (" 'the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States' ") (quoting THE FEDERALIST No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Indeed, by the middle of the Nineteenth Century, Chief Justice Taney thought this conclusion inescapable. On the basis of a comprehensive analysis of the text of Article I and this Court's prior cases, the Chief Justice concluded that "the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce . . . ; and such regulations are valid unless they come into conflict

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those of my brethren," *id.* at 222-23 (Johnson, J., concurring). And notwithstanding some stray *dicta*, Chief Justice Marshall's opinion for the Court in *Gibbons* did not reach the question, having concluded that the State law at issue in the case had been preempted by an Act of Congress. *Id.* at 200 ("We may dismiss that inquiry, because [the power to regulate commerce] has been exercised, and the regulations which Congress deemed it proper to make are in full operation."). In any event, as noted in the text, five years later the Court, also in an opinion by Chief Justice Marshall, unanimously upheld a Delaware statute authorizing placement of a dam over a navigable creek – and thus within the ambit of Congress' power to regulate interstate commerce – because Congress had not exercised its power. *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (27 U.S.) 245, 252 (1829).

with a law of Congress." *The License Cases*, 5 How. (46 U.S.) 504, 579 (1847) (Taney, C.J.), *overruled in part sub nom. Leisy v. Hardin*, 135 U.S. 100 (1890); *see also The Passenger Cases*, 7 How. (48 U.S.) 283, 470 (1849) (Taney, C.J., dissenting) (asserting that five Justices shared the above-quoted conclusion in *The License Cases*). Chief Justice Taney's analysis was rejected by the Court in *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 299 (1852); the reasoning in that case (though not its holding) set the Court on the uneven course it has followed to this day of attempting to devise a principled basis for upholding some state regulations affecting interstate commerce while invalidating others.

3. In *Cooley*, the Court considered the validity of a Pennsylvania statute regulating pilots assisting ships bound for Delaware River ports. The Court had no doubt that these regulations "do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution." 12 How. at 316. Indeed, the Court pointed out that the First Congress, pursuant to its Commerce Clause power, had authorized the states to enact statutes regulating pilots like the Pennsylvania law at issue in the case. *Id.* at 317-18. Moreover, following Hamilton's analysis in THE FEDERALIST NO. 32 and the Court's decisions in *Sturges*, *Houston v. Moore*, 5 Wheat. (17 U.S.) 122 (1819), and *Willson*, the *Cooley* Court acknowledged that because "[t]he grant of the commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter[, i]f they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the states." *Id.* at 318.

But for the first time, the Court adopted the view that "the nature of the power" could not be determined categorically, but instead varied from case to case:

> Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
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> Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Id. at 319.

What is significant about *Cooley* is not the particular line chosen – between regulations affecting subjects that are national in nature and those that are local in nature – but rather the assertion that a line could be drawn at all by the Court. As a textual matter, there is simply no basis for the suggestion that the unitary grant of authority to Congress to regulate interstate commerce sometimes does exclude action by the states, but sometimes does not. Most fundamentally, the *Cooley* Court failed to recognize that the essentially *legislative* act of deciding whether a particular subject ought to be governed by a national rule or by a local rule is itself the regulation of commerce.[25]

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[25] Ironically enough, the Court's holding in *Cooley* did appear to reflect this truth. In deciding that the Pennsylvania pilotage law was local in nature, and thus not barred by the Commerce Clause, the Court relied on Congress' "authoritative

Nevertheless, in *Case of State Freight Tax*, 15 Wall. (82 U.S.) 232 (1873), the Court for the first time invalidated a state law on the basis of the Commerce Clause even though the state law conflicted with no Act of Congress. The Court, however, was soon forced to admit that the theory set forth in *Cooley* – that the Commerce Clause itself barred some (though not all) state legislation in areas within the scope of Congress' power to regulate interstate commerce – was erroneous.

4. At the outset of its analysis, in the course of considering the impact of the 1789 statute authorizing the states to regulate pilots, the *Cooley* Court squarely acknowledged the implications of the notion that the Commerce Clause by its own terms bars at least some exercises of state power:

> If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner reconvey to the states that power.

12 How. (53 U.S.) at 318. However, when the Court actually faced Commerce Clause claims against state legislation specifically authorized by Congress but contrary to the Court's prior holding that the Commerce Clause prohibited such state legislation, the Court abandoned its own regulation of commerce (and with it the *Cooley* theory) rather than refusing to accept Congress' regulation.

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declaration . . . [that] the nature of this subject is . . . local and not national." 12 How. (53 U.S.) at 319. Nevertheless, the Court's opinion makes clear that where *the Court*, not Congress, determines that a particular subject is national in character, the States may not act even in the absence of congressional exercise of the power.

At the end of the last century, a number of states enacted prohibition legislation forbidding the transportation of liquor. In *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465 (1888), and *Leisy v. Hardin*, 135 U.S. 100 (1890), the Court struck down these laws under the *Cooley* theory, holding that "inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in character, [it] must be governed by a uniform system. . . . " *Leisy*, 135 U.S. at 109; *see also Bowman*, 125 U.S. at 480-81 (same). Congress, however, subsequently enacted legislation providing that liquor shipped in interstate commerce "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory. . . . " Act of Aug. 8, 1890, ch. 728, 26 Stat. 313.

In turning back a challenge to the application of this federal statute to save a Kansas prohibition law, the Court acknowledged that Congress may neither "transfer legislative powers to a state, nor sanction a state law in violation of the constitution." *In re Rahrer*, 140 U.S. 545, 560 (1891). Nevertheless, the Court recognized that Congress' decision "that the common interests did not require entire freedom in the traffic in ardent spirits" was not an attempt to delegate power to the states or to grant to them a power they did not possess. *Id.* at 561. Rather, Congress had "made its own regulation" of commerce, and the Court was bound to respect Congress' regulation because "[t]he framers of the constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge." *Id.* at 561, 562.

But the Iowa statute struck down in *Leisy* was indistinguishable from the Kansas law upheld in *Rahrer*. The Court resolved this tension by recharacterizing the basis for its negative Commerce Clause decisions. They rest, according to the *Rahrer* Court, on the proposition that "the inaction of congress was in itself equivalent to the

affirmative interposition of a bar to the operation of an undisputed power possessed by the states. We recall no decision giving color to the idea that, when congress acted, its action would be less potent than when it kept silent." *Id.* at 562; *see also id.* at 555 ("The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as congress might impose restraint. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.").

In other words, this Court's decisions invalidating state laws under the negative Commerce Clause do not, as the *Cooley* Court thought, reflect the judgment that such laws are inconsistent with the Commerce Clause itself; rather they reflect the judgment that Congress silently preempted such laws by *failing* to exercise its power to regulate commerce. Over the past century, the Court has consistently adhered to this view "whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause. . . . " *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 425 (1946); *see also id.* at 422-27; *James Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 326-31 (1917).[26]

5. The decision in *Prudential*, upholding a tax that is materially indistinguishable from the Alabama tax at

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[26] Indeed, the Court has often taken comfort in this rule in light of the substantial limitations on its ability to make economic policy. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) ("This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one Congress has the ultimate power to resolve.").

issue in this case, establishes beyond all question that the Commerce Clause itself does not give rise to the limitations imposed by the Court's negative Commerce Clause cases. South Carolina imposed a tax on the privilege of conducting the business of insurance in the state solely on insurance companies incorporated in other states; South Carolina insurance companies were not taxed. *Prudential*, 328 U.S. at 410-11. In light of the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, the Court upheld the tax notwithstanding the Court's then-recent decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). As the Court explained, the argument that "the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. *No conceivable violation of the commerce clause, in letter or spirit, is presented*. Nor is contravention of any other limitation." *Prudential*, 328 U.S. at 436 (emphasis added). Alabama's franchise tax likewise presents "no conceivable violation of the commerce clause" itself.

6. The principle laid down in *Rahrer, James Clark Distilling Co.*, and *Prudential* has profound implications concerning the legitimacy of the Court's negative Commerce Clause jurisprudence. It necessarily rests on the notion that the rules promulgated in the Court's cases are themselves regulations of commerce among the states. It is for this reason that the Court has readily acceded to congressional decisions to overrule them – Congress, not the judiciary, was given the power to regulate commerce. As the Court explicitly acknowledged in *Prudential*, accepting congressional supremacy in this area necessarily entails rejection of the *Cooley* belief that the Court's decisions in this area arise from its interpretation of the Commerce Clause, for Congress unquestionably lacks the authority to enact statutes that are contrary to the terms of the Constitution as it has been interpreted by this Court. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 176-77

(1803); *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164, 2168 (1997); *Seminole Tribe v. Florida*, 517 U.S. at 93 (Stevens, J., dissenting) (" 'A statute cannot amend the Constitution.' ") (citation omitted).[27] This reality lays bare the error in the Court's assumption of the authority to invalidate state laws in the absence of congressional action.

The theory that Congress has through its silence exercised the power granted to it to regulate interstate commerce runs headlong into the requirements of Article I, Section 7 of the Constitution. The Court has repeatedly emphasized that the Constitution permits Congress to exercise the powers granted to it in Article I, Section 8 only "in accord with a single, finely wrought and exhaustively considered procedure" entailing bicameral passage and presentment to the President. *INS v. Chadha*, 462 U.S. at 951; *see also Clinton*, 118 S. Ct. at 2103-04; *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("unenacted approvals, beliefs, and desires are not laws"); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that – silence."). The rules this Court has gleaned from the silence of Congress simply cannot be accorded the legal effect of Acts of Congress because they were neither

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[27] To be sure, the Court's opinions still often speak of its authority in this area as arising from the Commerce Clause itself. *See, e.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). But the Court's adherence to the understanding that Congress may reject judicial regulations in this area together with the unquestioned doctrine that the Court, not Congress, is the authoritative interpreter of the Constitution necessarily repudiates these statements, as the Court has recognized whenever squarely faced with legislation in which Congress has overridden one of the Court's negative Commerce Clause regulations.

passed by both Houses nor presented for approval to the President.[28]

It is true that the injury to separation of powers is somewhat mitigated by the fact that the Court defers to the legitimate holder of the power to regulate interstate commerce whenever Congress affirmatively expresses its disagreement with the Court's regulations. But just as it was "no answer" last Term "to say that Congress surrendered its authority by its own hand; nor [did] it suffice to point out that a new statute . . . could restore Congress to the power" it had attempted to relinquish in the Line Item Veto Act, *Clinton*, 118 S. Ct. at 2109 (Kennedy, J., concurring), Congress' ability to repeal this Court's regulations of commerce does not eliminate the harm to the Framers' design. *Cf. New York v. United States*, 505 U.S. 144, 182 (1992) ("Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

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[28] Moreover, whatever refuge the congressional silence theory affords cannot hide the reality that the Court's efforts in this field can only be understood as regulations of commerce – that is, legislation – promulgated by the Court itself. Like a legislature, the Court often must undertake extensive economic analysis in an attempt to develop beneficial regulations – analysis the Court has acknowledged Congress is better equipped to conduct. *E.g., Quill*, 504 U.S. at 318 ("the underlying issue is . . . one that Congress may be better qualified to resolve"). Moreover, the Court has been forced to develop principles governing when amendments to previously stated regulations shall be applied retroactively. *See American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) ("The very framing of the issue that we purport to decide today – whether our decision in *Scheiner* shall 'apply' retroactively – presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is.") (emphasis in original).

7. Even more troubling than the impact on the constitutional division of powers among the branches of the national government, the Court's negative Commerce Clause jurisprudence simply does not comport with the central axiom underlying our federal system: " '[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause.' " *Gregory*, 501 U.S. at 457 (citation omitted). The Supremacy Clause subordinates laws enacted by the states only to the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties. . . . " U.S. Const. art. VI. The Court's negative Commerce Clause regulations cannot be understood to flow from any of these sources – they are not mandated by the Commerce Clause itself, for Congress is free to amend them, and Congress has not enacted them into the laws of the United States.

The Court's decision in *Gregory* is instructive on this point. The Court emphasized the "decided advantage" held by the National Government in the "delicate balance" between federal and state power by virtue of the Supremacy Clause, pointing out that it enables Congress to "impose its will on the states. Congress may legislate in areas traditionally regulated by the states. This is an extraordinary power in a federalist system. It is a power that we must assume that Congress does not exercise lightly." 501 U.S. at 460. The negative Commerce Clause simply does not comport with this conception of our constitutional order, for its defining feature is the proposition that Congress has signaled its desire to exercise this "extraordinary power" by *not* acting. *See Rahrer*, 140 U.S. at 555 ("[T]he failure of congress to exercise this exclusive power [to regulate interstate commerce] in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.").

" '[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it.' " *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). But there is no "definite authority" behind the rules set forth in this Court's negative Commerce Clause jurisprudence – the Commerce Clause itself does not mandate these rules because Congress is free to change them and Congress has not promulgated them. Where a power granted to Congress is not exclusive, and Congress has not itself exercised the power granted to it, the Tenth Amendment precludes the Court from interfering with the states' actions. Put another way, the power to regulate commerce in the absence of congressional action was "not delegated to the United States by the Constitution," and certainly not to this Court, "nor prohibited by it to the States. . . . " U.S. Const. amend. X. Accordingly, this power is "reserved to the States respectively, or to the people." *Id.*

B. Considerations of *Stare Decisis* Do Not Preclude Abandonment of this Court's Negative Commerce Clause Jurisprudence.

1. This Court has repeatedly recognized that " '*[s]tare decisis* is not an inexorable command,' but instead reflects a policy judgment." *Agostini v. Felton*, 117 S. Ct. 1997, 2016 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). In this case, Alabama asks the Court to correct an error that has distorted the basic structures of our constitutional system. As Justice Scalia has put it, "the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent non-textual theory, that it was almost certainly not intended to undertake, . . . [but rather] acquired by a sort of intellectual adverse possession." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*,

483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

In this circumstance, the "policy judgment that 'in most matters it is more important that the applicable rule of law be settled than it be settled right,' " *Agostini*, 117 S. Ct. at 2016 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)), does not apply. Justice Brandeis, quoting Justice Holmes, has also stated the correct rule that applies where "this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states": it is " 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' " *Erie*, 304 U.S. at 80, 79 (citations omitted). Indeed, the Court's negative Commerce Clause jurisprudence is precisely analogous to the situation presented in *Erie*.

Like the negative Commerce Clause, the doctrine of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), permitted the federal judiciary to declare law, binding on the states, grounded in neither the Constitution nor in any Act of Congress. "Since the Constitution grants sole and exclusive power to Congress to regulate commerce among the states, repeated assumption of this power by the courts – even over a long period of years – could not make this assumption of power constitutional. April 25, 1938, this Court overruled and renounced an unconstitutional assumption of power by the Federal courts based on a doctrine extending back through an unbroken line of authority to 1842." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 454 (1939) (Black, J., dissenting) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

Moreover, as in *Erie*, "[d]oubt . . . as to the soundness" of negative Commerce Clause doctrine has been repeatedly expressed. *Erie*, 304 U.S. at 72. Two Terms ago, three Justices of this Court set forth a comprehensive

analysis demonstrating "the need to abandon that failed jurisprudence. . . . " *Camps Newfound/Owatonna*, 117 S. Ct. at 1615-20 (Thomas, J., dissenting); *see also id.* at 1616 n.4 (citing scholarly criticism).[29]

Further, again like *Erie*, "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; . . . and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties." *Erie*, 304 U.S. at 74. Likewise, as Justice Thomas has pointed out, "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application. In one fashion or another, every Member of the current Court and a goodly number of our predecessors have at least recognized these problems, if not been troubled by them." *Camps Newfound/Owatonna*, 117 S. Ct. at 1615-16 (Thomas, J., dissenting).

2. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). By its very nature, the Court's negative Commerce Clause jurisprudence is at war with these objectives. The judicial process does not lend itself to the formulation of sound economic regulations, and as a

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[29] The majority in *Camps Newfound/Owatonna* quite understandably did not directly address these arguments because no party in the case had asked the Court to repudiate its negative Commerce Clause precedents. *See, e.g., United States v. IBM*, 517 U.S. 843, 856 (1996) ("[W]e have rarely [overruled existing precedent] on grounds not advanced by the parties.").

result, the Court's efforts in this area have required constant revision. Justice Black, joined by Justices Frankfurter and Douglas, recognized this point nearly six decades ago:

> Judicial control of national commerce – unlike legislative regulations – must from inherent limitations of the judicial process treat the subject by the hit and miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. . . . Unconfined by "the narrow scope of judicial proceedings" Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union.

McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 188-89 (1940) (Black, J., dissenting). The inevitable result of these realities has been a jurisprudence constantly in flux – the very antithesis of "the evenhanded, predictable, and consistent development of legal principles," *Payne*, 501 U.S. at 827, *stare decisis* seeks to foster. *See, e.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. at 180 ("[T]he Court's understanding of the dormant Commerce Clause has taken some turns."); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959) (Court's negative Commerce Clause cases a "quagmire").

3. It has been suggested that retention of some portion of the Court's negative Commerce Clause jurisprudence may be necessary in order to "protect reliance interests. . . ." *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part and concurring in the judgment). However, examination of the interests served by dormant Commerce Clause doctrine reveals that they will be fully served by the mechanisms established by the Framers for their protection.

The Court has long justified its negative Commerce Clause cases by pointing to

> the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear . . . The provision thus 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Oklahoma Tax Comm'n, 514 U.S. at 179-80 (citations and quotations omitted).

There can be no question that this statement accurately captures the objective the Framers sought to achieve by including the Commerce Clause in the Constitution. It is equally clear, however, that abandonment of the negative Commerce Clause will not undermine this worthy goal because the text of the Constitution provides ample means for its attainment.

First and foremost, this Court's Twentieth Century jurisprudence has quite properly accorded Congress the

widest latitude in exercising its power to regulate interstate commerce. As Justice Kennedy has aptly observed, our current economic system depends upon the ability of Congress to "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring). Abandoning the negative Commerce Clause thus would in no way expose the Nation's economy to "Balkanization"; to the contrary, the means chosen by the Framers to avoid that result stand ready, if anything strengthened by the expansive understanding this Court has accorded the Commerce Power. Congress is fully empowered to take the steps necessary to block state laws that it concludes – that *it* concludes – are harmful to the economy.

Indeed, Congress could enact a negative Commerce Clause law, essentially prohibiting any state law having the effect of interfering with interstate commerce, or Congress could enact legislation adopting some but not all of the Court's negative Commerce Clause rules. Such legislation would grant the Court the authority it now lacks to police state laws thought to be inconsistent with good national economic policy.

To be sure, Congress may very well take a different view of particular state laws than that taken by this Court's negative Commerce Clause cases. For example, in *Prudential*, the Court described economic considerations supporting South Carolina's decision to tax only foreign companies for the privilege of conducting the business of insurance: "That judgment was one of policy and reflected long and clear experience. For, notwithstanding the long incidence of the tax and its payment by Prudential without question prior to the *South-Eastern* decision, the record of Prudential's continuous success in South Carolina over decades refutes any idea that payment of

the tax handicapped it in any way tending to exclude it from competition with local business or with domestic insurance companies." 328 U.S. at 432. The similar record of petitioners in this case could very well convince Congress not to impede Alabama's franchise tax. The point is Congress possesses both the institutional resources to make such fine economic judgments and the power to override state actions that it determines are contrary to the national economic interest.

Moreover, as Justice Thomas explained two Terms ago, the primary evil the Court has sought to combat in its negative Commerce Clause cases, discriminatory state taxes on goods traveling across state lines, could very well be prohibited by the plain text of another provision of the Constitution, the Import-Export Clause. *Camps Newfound/Owatonna*, 117 S. Ct. at 1620-28 (Thomas, J., dissenting) (asserting that the Court erred in *Woodruff v. Parham*, 8 Wall. (75 U.S.) 123 (1869), in limiting Import-Export Clause to overseas trade).[30]

Finally, it is important to recognize that existing reliance interests will not be seriously disrupted by a decision to restore the structure established by our Constitution, a decision acknowledging the power of the states to regulate and tax as they see fit whenever their actions do not conflict with Congress' exercise of its power to regulate commerce. It is true that Congress has undoubtedly foresworn some preemptive regulation it otherwise would have enacted in light of the Court's activity in this field. But the states have likewise foresworn legislation contrary to this Court's cases – either

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[30] Application of the Import-Export Clause to trade among the States would not call into question Alabama's franchise tax because it plainly is not "a tax levied on *goods* at the time of *importation*." *Camps Newfound/Owatonna*, 117 S. Ct. at 1628 (Thomas, J., dissenting) (emphasis in original).

voluntarily or following litigation. A decision abandoning the negative Commerce Clause would put Congress on notice that activity by the states going forward will be upheld unless Congress exercises its Commerce Clause power to block it. In this way, the effect of such a decision would be to provide both Congress and the states with a clean slate, thereby enabling "a single courageous state [to], if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction or as improvidently granted. In the alternative, the judgment of the Alabama Supreme Court should be affirmed.

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December 8, 1998